Filed 1/15/19 In re X.R. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re X.R. et al., Persons Coming Under the Juvenile Court Law.	
TULARE COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. MIGUEL C., Defendant and Appellant.	F077460 (Super. Ct. Nos. JJV069148A, JJV069148B) **OPINION**

APPEAL from orders of the Superior Court of Tulare County. Hugo J. Loza, Judge.

Carolyn S. Hurley, under appointment by the Court of Appeal, for Defendant and Appellant.

Deanne H. Peterson, County Counsel, John A. Rozum and Amy-Marie Costa, Deputy County Counsel, for Plaintiff and Respondent.

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Miguel C. (father) appeals from orders after a combined Welfare and Institutions Code section 366.26[1] and section 388 hearing at which the juvenile court denied father's section 388 petition seeking reunification services, terminated his parental rights to X.R. and E.R., and selected adoption as the children's permanent plan.

On appeal, father challenges an earlier disposition order denying him reunification services and visitation. He also challenges the juvenile court's denial of his section 388 petition. We affirm.

Previous Dependency

In August 2015, 14-month-old X.R. came to the attention of the Tulare County Health and Human Services Agency (Agency) when he was found sleeping with mother in the bed of a pickup truck. Mother was in possession of methamphetamine. X.R. was coughing and spitting up green matter. He was suffering from bronchitis and had poor hygiene. A section 300 petition was filed alleging mother, who was pregnant, had an extensive substance abuse history and was unable to care for X.R. due to her transient lifestyle.

Mother claimed father was the father of X.R. Mother denied having contact information for father, but her family indicated father was not certain he was X.R.'s father because mother was working as a stripper when the child was conceived. The Agency had initially been given an inaccurate birth date for father. When the correct birthdate was discovered, it was learned that father had been in a local jail but was released August 26, 2015. The Agency sent notice to his last known address, but no response was received.

Father had a criminal history under two different last names. He had a lengthy record, including multiple charges for auto theft or receiving stolen property, as well as

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

substance use and possession charges. In 2009, father pled no contest to being under the influence of a controlled substance and was sentenced to five years of drug court. In October 2014, he pled no contest to possession of a controlled substance and was sentenced to three years of recovery court and required to register as a narcotics offender.

Mother was present at detention; father was not. Mother testified she never married nor lived with father, his name was not on X.R.'s birth certificate, and he had not "really acknowledged" being the father. He was found to be an alleged father. The Agency placed X.R. with mother once she entered a treatment facility, and she was provided family maintenance services. In November 2015, mother gave birth to E.R., who remained with her at the treatment facility.

In March 2016, father was located at the Tulare County Men's Correctional Facility with a scheduled release date of November 10, 2016. A notice of the upcoming September 2016 hearing was sent to father, but there was no corresponding order for production of father. At that hearing, the juvenile court terminated jurisdiction and granted mother sole legal and physical custody of X.R. The custody order stated no visitation was ordered for father because he was an alleged father and "never visited with the child."

Current Dependency

Detention

In October 2017, E.R., now almost two years old, came to the attention of the Agency when father checked E.R. into the hospital with a bug bite. Mother, acting aggressive and verbally abusive to father, arrived the following day. At one point, a nurse heard a loud noise and E.R. crying. When the nurse looked through the door into the room, she saw mother splashing water on her face. Mother then left and returned three hours later with a bandana covering her face. Both mother and father interfered with the hospital staff when they attempted a blood draw from E.R. Mother eventually left and father did not have contact information for her.

X.R., now three years old, and E.R., almost two years old, were removed from father and placed in foster care. Mother's whereabouts were unknown. A section 300 petition was filed alleging mother's substance abuse and mental illness rendered her unable to care for the children. It also alleged mother and father failed to protect the children from domestic violence.

Other recent referrals involving mother and father had been received. One from June 2017, alleged domestic violence and that father was not allowed at mother's apartment complex because he broke a window. A second referral from July 2017, stated mother's home was filled with marijuana smoke while the children were sleeping in the living room, and there were male visitors coming and going. She tested positive for marijuana and trace amounts of methamphetamine and subsequently failed to show for two drug tests. Mother was evicted from her apartment and, at the end of August 2017, contacted father for assistance with the children. He had cared for them at paternal grandmother's home between then and bringing E.R. to the hospital in October. During this time period, mother came and went. Father had arrest warrants due to violations of the terms of his mandatory supervision, including a felony property offense. Father reported that he wished to reunify with the children.

A Court Appointed Special Advocate (CASA) report filed at the end of October 2017, stated a third placement was being sought for the children. Father objected to the first, since it was Spanish-speaking only; and the second had medical issues involving their own son. Both children exhibited poor communication skills and had other issues.

At the detention hearing, the CASA was given education rights to the children because neither mother nor father was present. Jurisdiction/disposition was set for November 2, 2017.

Jurisdiction/Disposition Report

The report prepared in anticipation of jurisdiction/disposition added details of the circumstances of E.R.'s visit to the hospital for an infected bug bite. Father brought E.R.

in and mother arrived later, agitated, and verbally abusive towards father. She and father both interfered with the hospital staff when they attempted to "start[ ] an IV" on E.R. The staff asked that mother wait outside and she left. At one point, mother and father were found sleeping in E.R.'s hospital bed and E.R. was lying on a bench in the room.

When the social worker arrived, it was reported that E.R. would have been discharged with antibiotics, but due to concern over mother's behavior, the child was admitted. Maternal and paternal grandmothers were at the hospital, as was a maternal aunt. Paternal grandmother explained that the children and father had been staying with her for five weeks, while mother came and went. Mother and father argued about how to care for the children, and mother said she would take the children once she got housing.

Father was informed by the social worker of concerns regarding drug use and domestic violence. The children were detained and father was advised to drug test. A few days later, a social worker contacted father, who was upset and did not understand why the children were detained. He denied substance abuse since completion of a drug program in 2016 and denied any domestic violence. He failed to drug test.

Father reported that he worked odd hours for a tile company, but he would make himself available for services and visits. He had arrests for being under the influence of marijuana and methamphetamine, and for joyriding and unlawful taking of a vehicle. Father currently had three active warrants and believed he would have to do time, but stated paternal grandmother would care for the children.

Father appeared late for a meeting with the social worker on October 20, 2017. When told he would need to wait 10 minutes, he left, stating he was concerned he would be arrested due to outstanding warrants. Father claimed he was arrested on October 24, 2017. He missed a visit with the children, missed a third scheduled meeting with the social worker, and failed to drug test. The probation officer reported father was picked up on October 27, 2017, on old warrants from 2012 for being under the influence and for possession, but that he also had fresh charges. Father had participated in drug treatment

and tested negative on May 4, 2017, but tested positive for methamphetamine on May 24 and June 7, 2017. A release date for father was not known.

The report recommended that mother not receive reunification services pursuant to section 361.5, subdivision (b)(1).[2] It was recommended that father be found to be the presumed father, but that reunification services be denied him pursuant to section 361.5, subdivision (b)(13).[3] Both mother and father had completed a past drug program and appeared to have relapsed. Father was encouraged to attend services on his own and could be provided referrals for an AOD assessment, parent training, mental health services, and domestic violence classes.

Jurisdiction/Disposition Hearing

Father, in custody, was present at the November 2, 2017 hearing. A paternity test was ordered and the hearing continued. At the continued hearing January 4, 2018, mother's whereabouts was still unknown. With paternity test results, the juvenile court elevated father to presumed father status. According to father, he was currently incarcerated on an old 2013 case. He stated he had admitted himself to substance abuse treatment and successfully completed the program in January of 2017 (although the record showed he had subsequent positive drug tests). Father claimed he had not admitted himself earlier to a drug program due to the cost. According to father, he missed drug tests because he knew he had outstanding warrants and he wanted to make sure his children were safe before he did the time. He claimed when he was arrested on October 24, 2017, he tested clean.

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[2] Section 361.5, subdivision (b)(1) states reunification services need not be provided if the whereabouts of a parent is unknown.

[3] Section 361.5, subdivision (b)(13) provides reunification services need not be provided a parent if the parent has an extensive history of drug abuse and has resisted prior treatment within a specified period of time.

The Agency and minors' counsel argued father was using methamphetamine at the time he had a warrant out, he was not visiting the children, and he refused help from the Agency.

The juvenile court ordered a bypass of services for father, but noted father "knows what he needs to do," and that he could file a section 388 modification petition seeking renewed reunification services if he made sufficient progress prior to the section 366.26 hearing. Father stated he was getting out of custody in two days. Father was to be provided writ notice and was told he had seven days to file such notice. Visitation was denied as detrimental to the children. A section 366.26 hearing was set for April 12, 2018.

Section 388 Petition

On March 6, 2018, father filed a section 388 petition requesting reunification services. The petition stated he was released from custody January 6, 2018; entered residential treatment five days later; had two random drug tests that were negative; and had taken parenting classes and was attending community college. He requested an opportunity to reunify with his children.

A February 21, 2018 letter filed with the juvenile court stated father had enrolled in a 90-day residential treatment program January 11, 2018; he was elected to be house manager at the treatment center; he attended a minimum of eight self-help meetings a week; and he attended numerous drug and alcohol educational classes. Father also attached a certificate of completion for a class on non-violent parenting, "one of four parenting components."

The Agency objected to the section 388 petition, stating father's circumstances had not changed. He still did not understand why the Agency was involved and had taken his children. While it acknowledged father was initiating efforts, the Agency noted father had an extensive criminal history that included substance abuse; he had been ordered to complete five years of drug court in February 2009, December 2010, January

2011, March 2011, and April 2011, which was terminated in March 2012. He was then ordered to complete three years of recovery court in October 2014, which was terminated in July 2015 as unsuccessful. Father completed a residential drug program in early 2017 but had since relapsed and tested positive for methamphetamine in May and June of 2017. Warrants were issued due to his noncompliance with probation, and he recently served time for these warrants. Father also had another child, age 13, who lived with his mother. Father stated he was involved in raising him "for a few years," but had not been involved with him for the last five years.

The juvenile court ordered a hearing on the section 388 petition to be held April 12, 2018, to coincide with the section 366.26 hearing.

Section 366.26 Report

The report prepared for the section 366.26 hearing recommended mother and father's parental rights be terminated and X.R. and E.R. freed for adoption. The report stated X.R., age three, appeared developmentally delayed and would be soon treated for being tongue tied. X.R. was in need of dental work. E.R., now two years old, qualified for regional services and had a speech delay. The children had been in their current home since the end of January 2018, and were adjusting well. Neither mother nor father had visited. The care provider was willing to adopt both children.

Sections 388/366.26 Hearing

At the April 12, 2018, hearing, the juvenile court first heard testimony on the section 388 petition. Paternal grandmother testified she had had regular contact with the children since they were born and they had stayed in her home for various lengths of time, at most six weeks. She described father as coming and going from the home but, when he was present, was involved in raising the children, changing, feeding, playing with and bathing them. She claimed not to know father was using drugs or what crimes he had committed.

Father testified that when X.R. was born, he and mother were in a relationship and lived with maternal grandmother while trying to find their own place. He was incarcerated during the first dependency and did not know about it until he received a "huge package" in the mail. He assumed he would be brought to juvenile court for the hearing, but "nothing happened." After the first dependency, mother brought both children to visit him in prison. After he was released, father went into a recovery program for six months, but acknowledged he did not use the tools he needed at the time to lead a more productive life. He now felt he knew what he needed to do.

Father testified to having problems with probation because he went from "high alert probation to low," and his probation officer would show up at the house without calling and he would not be there. He would then get picked up. When he took E.R. to the hospital, he knew he had an outstanding warrant, but wanted the children placed with paternal grandmother and aunt before taking care of his legal situation. Father testified he had only a month of probation left and there were no other outstanding warrants. After his most recent release, he voluntarily entered a residential treatment program, did very well there, and was currently enrolled in a job search and training program. He had just been released from the recovery center the previous day and was still enrolled in some anger management classes.

The juvenile court, in addressing the section 388 petition, noted father had been in and out of custody for the last four years. The longest he had been out was eight months. The court noted father had been in a previous drug program by court order in 2016 and had tried hard to overcome his problems, but was still only in the process of trying to make that change. He had not yet shown a significant period of time in which he had been able to stay out of custody and stay sober. The juvenile court stated it was not able to make a finding that it would be in the best interest of the children to grant reunification services or return the children to father, stating the children had not seen father for the past six months and were in a stable placement.

The juvenile court denied the section 388 petition and, in addressing the section 366.26 determination, terminated father's parental rights "basically, for the same reason."

DISCUSSION

I. *Did the juvenile court err in denying reunification services pursuant to section 361.5, subdivision (b)(13) and abuse its discretion in denying father visitation*?

Father contends the juvenile court erred when it denied him reunification services pursuant to section 361.5, subdivision (b) because there was no evidence of resistance to prior court-ordered substance abuse treatment. He also contends the juvenile court abused its discretion when it denied him visitation when there was no showing of detriment to the children. Both of these orders were made at the time of disposition and a section 366.26 hearing set. Anticipating respondent's argument that he is barred from raising these claims now because he failed to do so by writ at that time, father claims he was not properly advised of the writ requirements for challenging an order setting a section 366.26 hearing.

We agree with respondent that father is barred from raising these issues, but in any event, find no error or abuse of discretion occurred.

Denial of Reunification Services Pursuant to Section 361.5, subdivision (b)(13)

We address the merits of father's contention that reunification services were wrongly denied.

"'It is difficult, if not impossible, to exaggerate the importance of reunification in the dependency system.' [Citation.]" (*In re Albert T.* (2006) 144 Cal.App.4th 207, 217.) Thus, "[t]here is a presumption in dependency cases that parents will receive reunification services. [Citation.] Section 361.5, subdivision (a) directs the juvenile court to order services *whenever* a child is removed from the custody of his or her parent *unless* the case is within the enumerated exceptions in section 361.5, subdivision (b)." (*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 95.)

"Section 361.5, subdivision (b) lists a number of situations in which reunification services are likely to be futile and need not be offered to a parent. [Citation.] These exceptions to the general rule reflect a legislative determination that in certain situations attempts to facilitate reunification do not serve the child's interests. [Citation.] When the juvenile court determines by clear and convincing evidence that one of the enumerated situations exists (§ 361.5, subd. (b)), reunification services shall only be ordered if 'the court finds, by clear and convincing evidence, that reunification is in the best interest of the child' (§ 361.5, subd. (c))." (*D.B. v. Superior Court* (2009) 171 Cal.App.4th 197, 202.) "Section 361.5 reflects the Legislature's desire to provide services to parents only where those services will facilitate the return of children to parental custody." (*In re Joshua M.* (1998) 66 Cal.App.4th 458, 470.)

The section 361.5, subdivision (b)(13) exception has multiple prongs. First, the parent must have "a history of extensive, abusive, and chronic use of drugs or alcohol." Second, the Agency must also show the parent either (a) "has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention," or (b) "has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible." (§ 361.5, subd. (b)(13).) For purposes of section 361.5, subdivision (b)(13), "prior court-ordered treatment" includes treatment ordered as a condition of parole or probation. (See *D.B. v. Superior Court*, *supra*, 171 Cal.App.4th at p. 204.)

We review an order denying reunification services under subdivision (b) of section 361.5 for substantial evidence. (*Cheryl P. v. Superior Court*, *supra*, 139 Cal.App.4th at p. 96.) Under such circumstances, we do not make credibility determinations or reweigh the evidence. (*A.A. v. Superior Court* (2012) 209 Cal.App.4th 237, 242.) Rather, we "review the entire record in the light most favorable to the trial court's findings to

determine if there is substantial evidence in the record to support those findings," (*ibid*) keeping in mind "'the heightened burden of proof.' [Citation.]" (*In re A.E.* (2014) 228 Cal.App.4th 820, 826; *In re I.R.* (2014) 226 Cal.App.4th 201, 211.)

Father does not deny a history of drug use. According to father, there was evidence of prior court-ordered treatment as an option for him to avoid jail time, but the program was not available and accessible to him because it was too expensive. The record shows father was court-ordered in October 2014 in two separate cases to attend recovery court but was terminated as unsuccessful in 2015.

Father asserts these failures of drug treatment were no longer relevant at the time of the January 4, 2018, jurisdiction/disposition hearing because he successfully completed a treatment program in early 2017. Although he acknowledges a relapse (testing positive in May and June 2017), he argues this is not sufficient evidence of resumption of regular drug use required for the exception to apply. We disagree.

Numerous cases have held that "resist[ance] to prior court-ordered treatment" may be shown by evidence the parent participated in court-ordered treatment but then later, and within three years prior to the filing of the current petition, returned to substance abuse. (See, e.g., *In re Brooke C.* (2005) 127 Cal.App.4th 377, 382; *In re Brian M.* (2000) 82 Cal.App.4th 1398, 1402; *Karen S. v. Superior Court* (1999) 69 Cal.App.4th 1006, 1008; *Laura B. v. Superior Court* (1998) 68 Cal.App.4th 776, 780; *Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, 73.) Resistance to treatment may be "easiest to prove if the facts demonstrated that the parent entered one or more available programs during the relevant period only to drop out repeatedly without completing them. But ... the concept of resistance does not require opposition to treatment by direct action." (*Laura B. v. Superior Court, supra,* at p. 780.) Although experiencing a brief relapse and immediately resuming treatment does not constitute resistance, evidence of resistance "may also come in the form of resumption of regular drug use after a period of sobriety." (*Ibid.*)

"The common definition of 'resist' ... encompasses both active and passive behavior. Thus, a parent can actively resist treatment for drug or alcohol abuse by refusing to attend a program or by declining to participate once there. The parent also can passively resist by participating in treatment but nonetheless continuing to abuse drugs or alcohol, thus demonstrating an inability to use the skills and behaviors taught in the program to maintain a sober life. In either case, a parent has demonstrated a resistance to eliminating the chronic use of drugs or alcohol which led to the need for juvenile court intervention to protect the parent's child. In other words, the parent has demonstrated that reunification services would be a fruitless attempt to protect the child because the parent's past failure to benefit from treatment indicates that future treatment also would fail to change the parent's destructive behavior." (*Karen S. v. Superior Court, supra,* 69 Cal.App.4th at p. 1010.)

Here, father's resistance to treatment within a three-year period prior to the October 2017 filing of the second dependency petition is shown by his participation in court-ordered substance abuse treatment in October 2014, terminated as unsuccessful in 2015; the court-ordered treatment program he entered in late 2016 after release from jail and completed in 2017, followed by his documented use of methamphetamine in May and June 2017; as well as his failure to test as requested by the Agency once the dependency petition was filed in October 2017. A rational fact finder could reasonably infer from this evidence that father did more than briefly relapse, he returned to regular use. Substantial evidence supports the juvenile court's finding that father had an extensive history of substance abuse and resisted prior court ordered treatment. The juvenile court did not err in applying section 361.5, subdivision (b)(13) to father.

Finally, father cannot demonstrate the juvenile court abused its discretion by concluding reunification would not serve X.R. and E.R.'s best interests. Pursuant to section 361.5, once the juvenile court determines that a parent is described by subdivision (b)(13) of that statute, it shall not order reunification services for the parent "unless the

court finds, by clear and convincing evidence, that reunification is in the best interest of the child." (§ 361.5, subd. (c)(2).) In making this determination, the juvenile court may consider "the parent's current efforts, fitness, and history; the seriousness of the problem that led to dependency; the strength of the parent-child and caretaker-child bonds; and the child's needs for stability and continuity." (*In re Allison J.* (2010) 190 Cal.App.4th 1106, 1116.)

Here, father's limited relationship with X.R. and E.R., his criminal and substance abuse past, and his behavior after removal of the children and prior to disposition, all demonstrate that father was more concerned about himself than he was about the children's welfare. On this record, there is simply no basis for concluding the juvenile court abused its discretion by declining to find reunification services would serve X.R. and E.R.'s best interests. We find no error in the juvenile court's ruling.

Denial of Visitation

Father also contends he was improperly denied visitation as there was insufficient evidence of detriment. As discussed above, the disposition orders, having not been the subject of a timely writ, are not subject to challenge. In any event, we reject father's claim.

When the juvenile court places a dependent child in foster care and orders reunification services, it shall also order visitation between the parents and child. (§ 362.1, subd. (a)(1)(A).) "Visitation shall be as frequent as possible, consistent with the well-being of the child," but "[n]o visitation order shall jeopardize the safety of the child." (§ 362.1, subd. (a)(1)(A), (B).) Thus, during the reunification period for a parent, visitation is mandatory absent the exceptional circumstance where visitation would threaten the child's safety. (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1491.)

By contrast, when the court has denied reunification services under the bypass provision used here (§ 361.5, subd. (b)(13)), visitation is discretionary (*In re J.N.* (2006) 138 Cal.App.4th 450, 457.) Section 361.5, subdivision (f) governs this situation and

provides: "The court *may* continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child." (§ 361.5, subd. (f), italics added.) The permissive language of the statute gives the court discretion to permit or deny visitation, "unless of course it finds that visitation would be detrimental to the child, in which case it must deny visitation." (*In re J.N., supra*, at p. 458.) In other words, despite father's claim to the contrary, no detriment finding is required to deny visitation. Unless and until the court makes such a finding, the power to grant or deny visitation lies within its discretion. The permissive language of the statute reflects the reality that visitation is not integral to the overall plan for the children when the parent does not receive reunification services. (*Id.* at pp. 458–459.)

Section 361.5, subdivision (f) "does not dictate a particular standard the juvenile court must apply when exercising its discretion to permit or deny visitation," but the best interest of the child "is certainly a factor the court can look to in exercising its discretion." (*In re J.N., supra,* 138 Cal.App.4th at p. 459.) We review the court's decision for abuse of discretion and ask whether the court exceeded the bounds of reason by making an arbitrary, capricious, or patently absurd decision. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318–319; *In re J.N., supra*, at p. 459.)

Here, the juvenile court did not abuse its discretion in denying father visitation. Father had little contact with the children save for the five weeks prior to the current dependency. At detention October 12, 2017, the juvenile court ordered father supervised visitation twice a week for two hours. Visits were scheduled for October 24 and October 27, 2017, but father did not attend either visit, nor did he contact the Agency to state why he was unable to attend. Father was then taken off of the visitation schedule until he made himself available to the Agency. Because father was found to be incarcerated at the Tulare County Men's Correctional Facility, the Agency recommended visitation be found detrimental, due to the children's young ages. At disposition January 4, 2018, father was

present, but still in custody. The juvenile court adopted the recommendation of the Agency and found visits between father and the children would be detrimental.

We find no abuse of discretion on the part of the juvenile court in denying visitation.

II. *Did the juvenile court abuse its discretion when it denied father's section 388 request for reunification services*?

Father argues the juvenile court abused its discretion when it denied his section 388 petition because he submitted new evidence that his circumstances had changed and that granting reunification services was in X.R. and E.R.'s best interests because he was "becoming a better parental role model, enabling the child[ren] to grow up with their biological family." We disagree.

Section 388 permits a parent of a dependent child to petition for a hearing to change, modify, or set aside any previous court order. (§ 388, subd. (a).) "A section 388 petition must show a change of circumstances and that modification of the prior order would be in the best interests of the minor child." (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223.) "[T]he change in circumstances must be substantial," as in "changed," not "changing" circumstances. (*Ibid.*) Typically, the parent must demonstrate changed circumstances by a preponderance of the evidence. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) We review the juvenile court's ruling for abuse of discretion. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685–686 ["denial of a section 388 motion rarely merits reversal as an abuse of discretion"].)

The record here lacks evidence of the significant type of change required to grant a section 388 petition. As the court noted at the hearing on the petition, while father had done well for the past three or four months while in drug treatment, "based upon his entire history, … the best you can say about his current situation is that he's still in the process of attempting to gain sobriety." Father had only completed the residential treatment program the day before the section 388 hearing.

While a parent's efforts to change and improve are always commendable, at best, the evidence father presented demonstrates only changing—not changed—circumstances. (*In re Ernesto R., supra,* 230 Cal.App.4th at p. 223 [changing circumstances are insufficient to warrant modifying a previous court order].) Father only recently once again began to address his serious substance abuse by entering yet another program. However, in light of his history of inability to complete treatment and follow-up for a substantial length of time with sobriety, father's recent actions do not constitute the kind of substantial change required to grant his section 388 petition.

Because father did not establish the first prong required to prevail on a section 388 petition, we need not examine whether granting the petition and reinstating reunification services would be in X.R. and E.R.'s best interests. The court did not abuse its discretion when it denied father's petition.

DISPOSITION

The orders are affirmed

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FRANSON, J.

WE CONCUR:

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LEVY, Acting P.J.

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SNAUFFER, J.